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Supreme Court, U.S.
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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

CITY OF NEW YORK; DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT OF NEW YORK CITY; CHINESE-AMERICAN PLANNING COUNCIL, INC.,

Petitioners,

- against -

KAM SHING CHAN, et al.,

Respondents.

PETITION BY MUNICIPAL PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 30, 1993.

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QUESTIONS PRESENTED

Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301, et seq. ("HCDA, Title I"), consolidated all pre-existing urban renewal and community development funding programs into one single grant program. Its labor standards provision, which is codified at 42 U.S.C. § 5310, provides that all laborers employed on construction work financed by Title I funds shall be paid prevailing wages in accordance with the Davis-Bacon Act. The questions presented are:

1. Whether under Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) and Suter v. Artist M, __ U.S. ___, 112 S. Ct. 1360 (1992), HCDA, Title I confers upon laborers a right, enforceable under 42 U.S.C. § 1983, to receive prevailing wages?

2. Where Congress, when it enacted HCDA, Title I and numerous other Davis-Bacon Related Acts, also incorporated an administrative enforcement mechanism to remedy violations of the labor standards of these acts and where this Court in Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981), recognized that the creation of a private right of action for laborers seeking the payment of Davis-Bacon wages would undercut this administrative enforcement scheme, whether the Second Circuit erred in determining that Congress did not intend to preclude a 42 U.S.C. § 1983 remedy for violations of HCDA, § 5310?

3. Where the City of New York and the Chinese-American Planning Council ("CPC"), a private not-for-profit organization, entered into contracts pursuant to which CPC was to rehabilitate certain City-owned property, and

where the contracts provided that CPC had to comply with all applicable federal laws, whether CPC's conduct in paying wages constituted state action where the City placed a per day per worker funding cap in the contracts which was allegedly insufficient to permit CPC to pay prevailing wages?

PARTIES

The City of New York and the Department of Housing Preservation and Development of the City of New York, who were defendants below, are petitioners before this Court ("municipal petitioners").

Chinese-American Planning Council, Inc., also a defendant below, is filing a separate petition for a Writ of Certiorari.

Respondents, plaintiffs below, are:

Kam Shing Chan; Kam Tai Chan; Jing Ye Chen; Shan Non Chiu; Bak Lok Chu; Kok Kun Chu; Israel Gonzalez; Sui Bin Huang; Jian Ning Jiang; Kam Fai Kwok; Moon Shuen Kwong; Wei Xiang Lee; Yang I Lee; Young Shi Lee; Bing Zhao Li; Hao Hui Li; Kei Man Li; Wai Tai Li; Chi Kwong Liu; Jack Ye Louie; Sheng Hua Lu; Tian Guang Mai; Cheuk Mink Ng; Kin Chung Ng; Kin Hin Ng; Shun Gao Shen; Ten Jen Shen; Hau Wing Sin; Vein Dinh Sintruong; Wing Shing Tse; Wai Man Wan; Kong Htyan Wu; Xu Ming Wu; Guo Xuan; Yue Nam Zhu.

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(1) Congress intended that HCDA, § 5310 and the prevailing wage provisions of all Davis-Bacon Related Acts be enforced by the Department of Labor. 12

(2) The Second Circuit's reasoning gives workers an unprecedented right of action under Section 1983 to enforce not only the Davis-Bacon wage provision of HCDA, Title I but also of several other Davis-Bacon Related Acts that contain identical or similar wage provisions. 20

(3) In determining that HCDA, § 5310 created an enforceable right, the Second Circuit failed to interpret that provision in the context of the rest of HCDA, Title I as required by Suter v. Artist M., ___ U.S. ___, 112 S.Ct. 1360, 1370 (1992). Further, the Second Circuit's decision conflicts in principle with Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 774 (1st Cir., 1986). 24

(4) **Lower Courts need guidance as to the proper framework to apply in determining whether a federal statute creates a right enforceable under Section 1983.** 27

(5) **The Second Circuit has expanded the state action doctrine and has imposed on all state governing entities an obligation to ensure that government contracts, on their face, are sufficiently funded to permit the contractor to pay Davis-Bacon wages, where applicable.** 29

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PETITION BY MUNICIPAL PETITIONERS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The municipal petitioners, the City of New York and the Department of Housing Preservation and Development of New York City, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-entitled action on July 26, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, entered July 26, 1993, and from which review is sought, is reported at 62 USLW 2089 (2d Cir., 1993). A copy is reprinted in the Appendix to this Petition at page A1. The opinion and order of the United States District Court for the Southern District of New York (Ward, D.C.J.), entered June 5, 1992, as modified by an opinion and order of the District Court entered September 8, 1992, is reported at 803 F. Supp. 710 (S.D.N.Y., 1993). A copy is reprinted in the Appendix at page A26. The report and recommendation of Magistrate Judge Francis dated January 6, 1992 is unreported and is annexed to the Appendix at page A96.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit sought to be reviewed was entered July 26, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition has been filed within the time allowed by law.

STATUTORY PROVISIONS

This case arises under the Civil Rights Act of 1871, 42 U.S.C. § 1983 and involves the interpretation of Section 5310 of Title I of the Housing and Community Development Act of 1974, 42 U.S.C. § 5301, et seq. References in this petition are further made to the Davis-Bacon Act, 40 U.S.C. § 276(a); Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix, 64 STAT. 1267; Miller Bond Act of 1935, 40 U.S.C. § 270a; Elementary and Secondary Education Act, 20 U.S.C. § 1232b; Headstart, Economic, Opportunity and Community Partnership Act of 1974, 42 U.S.C. § 2992a; Energy Conservation and Production Act, 42 U.S.C. § 6881(h); Commercial Fisheries Research and Development Act of 1964, 16 U.S.C. § 779; Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(a); Domestic Volunteer Services Act, 42 U.S.C. § 5046; Emergency Community Facilities Act of 1970, 42 U.S.C. § 3107; Energy Security Act, 42 U.S.C. § 8775; National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. § 954(n); Older Americans Act of 1965, 42 U.S.C. § 3027(a)(14)(D); Solid Waste Disposal Act, 42 U.S.C. § 6979; and Hospital Survey and Construction Act, 42 U.S.C. § 291. These statutes have been reprinted in the Appendix, beginning at page A109. References are also made to 29 C.F.R. Parts 1 and 5 (1974). Relevant portions of these regulations have been reprinted in the Appendix, beginning at page A121.

STATEMENT OF THE CASE

Basis for Federal Jurisdiction

This action was commenced pursuant to 42 U.S.C. § 1983 and the jurisdiction of the District Court was invoked under 28 U.S.C. §§ 1331 and 1337.

Background Facts

The City of New York and co-petitioner Chinese-American Planning Council ("CPC"), a private non-profit organization, entered into three annual contracts pursuant to which CPC was to perform "construction, repair and rehabilitation" work on certain city-owned properties (72-194, 317-421, 939)[1].

The contracts served two significant purposes: (1) to preserve and develop City housing and (2) to provide training and employment opportunities to persons historically at risk for unemployment, such as recent refugees, immigrants, ex-addicts, homeless persons and long-term welfare recipients. Under the contracts, CPC was responsible for hiring and paying workers to perform the contract work. It was also required to provide its workers with work experience, training, counseling and other social services (75, 94-95, 342-939). For the above

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[1] Numbers in parentheses refer to pages of the Appendix filed in the Court of Appeals for the Second Circuit; numbers in parentheses preceded by the letter "A" refer to the Appendix to this Petition.

services, the City agreed to pay CPC $90-$95 per worker per day (99, 348, 939bb).

Although the contracts required CPC to comply with all federal laws, including the payment of prevailing wages where applicable (89, 129, 337, 382), there was no pre-contract determination by the parties as to whether the work performed by respondents constituted work covered by the Davis-Bacon Act.

The contracts were funded with federal community development grants furnished under the Housing and Community Development Act of 1974 ("HCDA"), 42 U.S.C. § 5301 et seq.. The HCDA consists of eight chapters that cover a broad range of Federal housing and urban development programs. Title I of the HCDA, known as the Community Development Assistance Act of 1974, codified at 42 U.S.C. §§ 5301 through 5320, consolidates all pre-existing urban renewal and community development programs into one single program where federal funding is distributed to localities in the form of block grants. Title I funds may be used for a wide range of community development activities, including housing development and preservation and the provision of certain social services.

HCDA, Title I is a Davis-Bacon Related Act. Its labor standards provision, which is set forth in 42 U.S.C. § 5310, provides, in pertinent part:

> All laborers and mechanics employed by contractors or subcontractors in the

> performance of construction work financed in whole or in part with assistance received under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended (40 U.S.C. § 276a-276a-5)... The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan No. 14 of 1950 (15 F.R. 3176; 64 Stat. 1267) and Section 276c of Title 40.

Respondents, laborers hired by CPC to perform work under the contracts, allege that CPC failed to pay them prevailing wages in violation of HCDA, § 5310. They commenced this action pursuant to 42 U.S.C. § 1983 and pursuant to an asserted implied right of action under HCDA, § 5310, seeking back wages, damages and attorneys' fees. Additionally, respondents interposed pendent state claims (15-44).

The City and CPC moved separately for dismissal of respondents' federal claims arguing that (1) there was no implied right of action under HCDA, § 5310; (2) a 42 U.S.C. § 1983 action could not be maintained because CPC, in paying wages, was not acting under color of state law; and (3) HCDA, Title I did not create a right, enforceable under § 1983, to receive prevailing wages (45-605).

The Report of the Magistrate Judge

In a Report and Recommendation dated January 6, 1992, Magistrate Judge James C. Francis IV, recommended that the motions to dismiss be granted in their entirety (A96).

The Decision of the District Court

In an opinion and order dated June 5, 1992, the District Court modified the Magistrate Judge's findings and recommendations. The District Court granted defendants' motion to dismiss those claims brought pursuant to an asserted implied right of action under HCDA, § 5310. It, however, denied the motions to dismiss the 42 U.S.C. § 1983 claims (A26-78).

In an opinion and order dated September 8, 1992, the District Court, pursuant to 28 U.S.C. § 1292(b), certified for interlocutory appeal so much of its order as denied the motions to dismiss the § 1983 claims (A79). By order entered November 10, 1992, the Court of Appeals for the Second Circuit granted the City and CPC permission to appeal (A25).

Thereafter, on January 5, 1993, the District Court entered a final judgment, pursuant to Fed. R. Civ. P. 54(b), dismissing respondents' implied private right of action claims under HCDA, § 5310 (A94). Respondents then filed a notice of appeal and, thereafter, both appeals were consolidated.

Decision of the Court of Appeals

The Second Circuit affirmed the District Court's order (A1-24). With respect to respondents' 42 U.S.C. § 1983 claims, the Court found that if respondents could prove their allegations that the City placed a per worker per day funding cap which did not permit CPC sufficient funds to pay prevailing wages, then CPC's conduct in failing to pay prevailing wages would constitute state action (A21-24).

Then, the Second Circuit held that under either the analysis set forth in Wilder v. Virginia Hospital Ass'n, 496 U.S. 498 (1990) or in Suter v. Artist M., __ U.S. __, 112 S.Ct. 1360 (1992), HCDA, § 5310 conferred upon respondents a right, enforceable under 42 U.S.C. § 1983, to receive prevailing wages.[2] The Court found that laborers were the intended beneficiaries of Section 5310

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[2] Under Wilder, the determination of whether a federal statute creates a right enforceable under Section 1983 "turns on whether the provision in question was intend[ed] to benefit the putative plaintiff". Wilder, 496 U.S. at 509. If there was such an intent, then an enforceable right is created unless (1) the statute reflects merely a "congressional preference" for a certain kind of conduct rather than a binding obligation on the government or (2) the interest plaintiff asserts is "too vague and amorphous" to enforce. Id. However, even if it is determined that an enforceable right does exist, there is no relief under Section 1983 if there is a "comprehensive enforcement scheme'" under the statute which demonstrates congressional intent to preclude enforcement of that right under Section 1983. Id.

Under Suter, the inquiry is whether Congress in enacting the statute "unambiguously conferred" a right enforceable under Section 1983.

(A17). It reasoned that "[w]hile the ultimate goal of Congress in enacting the HCDA was, as a whole, the development of viable urban communities by providing decent housing and expanding economic opportunities for persons of low and moderate income, there can be no question that the provision for payment of a certain minimum wage confers its principal benefit on the wage earners" (A17). Next, the Court found that Congress intended to impose a binding obligation on the recipients of Title I funds to pay prevailing wages because Congress employed the term "shall be paid" in Section 5310 (A17).

Finally, the Second Circuit found that although Congress specifically adopted an administrative enforcement mechanism to enforce Section 5310, that enforcement scheme was not sufficiently comprehensive so as to evince Congressional intent to preclude a Section 1983 remedy (A18-20). For all the above reasons, the Second Circuit affirmed the denial of the motions to dismiss respondents' Section 1983 claims.

The Second Circuit found, however, that respondents' claims brought pursuant to an implied right of action under HCDA, § 5310 were properly dismissed. It reasoned that Congress intended that Section 5310 should be enforced through the administrative enforcement scheme set forth in Section 5310 and that although "there was no statement that these would be the exclusive means of enforcement, there simply was no indication that, along with the cited regulatory mechanism, Congress also

intended to authorize laborers to bring private suits." (A13-14).[3]

REASONS FOR GRANTING THE WRIT

The Second Circuit is the first Court to hold that laborers may bypass the administrative enforcement scheme before the Department of Labor and seek enforcement of Davis-Bacon wage standards in a 42 U.S.C. § 1983 action. Its holding is not limited in its application to HCDA, § 5310 since at least ten other Davis-Bacon Related Acts contain identical or similar prevailing wage provisions. This holding is contrary to Congress' intent that HCDA, § 5310 and all other Davis-Bacon Related Acts be enforced by the Department of Labor pursuant to Reorganization Plan No. 14 of 1950 and the regulations promulgated pursuant thereto. In Universities Research Ass'n, Inc. v. Coutu, 450 U.S. 754 (1981), this Court recognized that if Courts were permitted to make de novo Davis-Bacon coverage and classification determinations, this "elaborate" administrative enforcement scheme would be disrupted and the "uniformity fostered by those regulations would be

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[3] The implied private right of action analysis is different from the Section 1983 inquiry. Whether a statute creates an implied right of action is analyzed under the framework set forth in Cort v. Ash, 422 U.S. 66 (1975). If Congress has expressly provided other remedies for a particular statute, no other remedies are to be implied unless there is evidence of Congress' intent to the contrary. Under the Section 1983 inquiry, however, if a statute creates an enforceable right, that right is enforceable pursuant to Section 1983 unless Congress has affirmatively withdrawn a Section 1983 remedy.

short-lived." Id. at 783. Thus, this case raises important issues which should be resolved by this Court.

Further, the Second Circuit interpreted HCDA, § 5310 in isolation, and failed to read it in the context of the rest of Title I as required by Suter v. Artist M., __ U.S. __, 112 S.Ct. 1360, 1370 (1992). Also, the Second Circuit's decision that laborers were the intended beneficiaries of HCDA, § 5310 conflicts in principle with the First Circuit's decision in Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 774 (1st Cir., 1986). The First Circuit there determined that minority citizens of a city were not the intended beneficiaries of 42 U.S.C. § 5309(a), the anti-discrimination clause of Title I, because Title I was enacted not for their especial benefit but for the benefit of the communities and localities to whom the funds would be distributed.

Moreover, a Writ should be granted because lower courts need guidance as to the proper framework to apply in determining whether a federal statute creates an enforceable right under 42 U.S.C. § 1983. Several circuits have questioned the viability of Wilder after Suter and Justice Blackmun, in his dissenting opinion joined by Justice Stevens in Suter, opined that the majority had departed from the Wilder framework. 112 S.Ct. at 1375, 1377.

Finally, the Second Circuit has expanded the state action doctrine by finding state action in this case based on the allegations that the City placed a per worker per day

funding cap in the contracts which did not permit CPC sufficient funds to pay prevailing wages.

(1)

Congress intended that HCDA, § 5310 and the prevailing wage provisions of all Davis-Bacon Related Acts be enforced by the Department of Labor.

This case raises important and significant issues because it is the first time that a Court has recognized that any Davis-Bacon Related Act confers upon laborers a right, enforceable under 42 U.S.C. §1983, to be paid prevailing wages. As set forth below, the recognition of such a right is completely contrary to congressional intent that Section 5310 and the wage provisions of all Davis-Bacon Related Acts be enforced by the Department of Labor.

Congress did not intend to create an enforceable right when it enacted Section 5310, but rather a "generalized duty" to be enforced by the Department of Labor. See, Suter, supra, 112 S.Ct. at 1368-1370. When Congress incorporated the Davis-Bacon wage standards into Section 5310, it also adopted the Davis-Bacon administrative enforcement scheme set forth in Reorganization Plan No. 14 and the regulations promulgated by the Secretary of Labor pursuant thereto. 29

C.F.R. Parts 1, 3, 5, 7.[4] At that time, this administrative enforcement scheme included, among other things, the right of laborers to file complaints of underpayment of wages with the Department of Labor, 29 C.F.R. § 5.6(3) (1974)(A124); (2) a dispute resolution procedure, which included a hearing before an Administrative Hearing Officer in which employees could participate as interested parties, 29 C.F.R. §§ 5.11 (1974)(A127); (3) the right of an employee, as an interested party, to appeal to the Wage Appeals Board. 29 C.F.R. § 5.11 (1974); and (4) judicial review under the Administrative Procedure Act, 5 U.S.C. § 701, et seq. of certain decisions of the Wage Appeals Board, including coverage and classification determinations. See, e.g., Building and Construction Trades Department, AFL-CIO v. Department of Labor, 932 F.2d 985 (D.C. Cir., 1991); Holloway Construction v. Wage Appeals Board, 825 F.2d 1072 (6th Cir., 1987).[5]

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[4] HCDA, § 5310 provides that the "Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan No. 14 of 1950." The regulations promulgated by the Department of Labor to enforce the Davis-Bacon Related Acts incorporate all the enforcement mechanisms available for violations of the Davis-Bacon Act itself, with the exception of the Miller Bond Act of 1935. The Miller Bond Act, 40 U.S.C. § 270(a), provides persons furnishing labor or materials with a limited judicial remedy allowing them to "bring suit against the contractor on the payment bond ... require[d] ... under certain federal contracts." Universities Research Ass'n v. Coutu, 450 U.S. at 758.

[5] While a number of circuits have held that certain determinations of the Department of Labor are reviewable, this Court has not expressed a view on this matter except to note that the correctness of a wage rate

(continued...)

If the Department of Labor found a wage violation, it could have (1) directed the federal agency administering the federal grant to suspend payment and to withhold sufficient funds to compensate the employees (29 C.F.R. § 5.9 (1974))(A126); (2) requested the contractor to make restitution to the employees (29 C.F.R. § 5.10(a) (1974))(A126); (3) deemed the contractor ineligible for contracts funded by Davis-Bacon Related Acts for three years (29 C.F.R. § 5.6(b) (1974))(A125); and (4) referred the matter for criminal prosecution. 29 C.F.R. § 5.10(b) (1974)(A127).[6]

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[5] (...continued)
determination made by the Secretary of Labor pursuant to 29 C.F.R. § 1(a) is not subject to judicial review. Coutu, 450 U.S. at 761, n. 10.

[6] Under the present regulations, the dispute resolution procedure which includes a hearing before an Administrative Law Judge ("ALJ") is instituted by the Administrator of the Department of Labor's Wages and Hours Division on the employee's behalf. After the ALJ renders a decision, the employee may either allow the Administrator to continue to proceed on his or her behalf, or, the employee, as an interested party, may appeal to the Wage Appeals Board. 29 C.F.R. § 5.11 (b) (3) (1993); 29 C.F.R. § 7.2(b) (1) (1993). The rest of the administrative scheme is essentially the same, including the right of anyone, including an employee, to file a complaint. See, 29 C.F.R. § 5.6(a)(3)(1993) ("Complaints of alleged violations shall be given priority").

In fact, there is a proceeding presently pending before the Department of Labor regarding respondents' claims of underpayment. The Department of Labor has issued a ruling requesting that CPC provide plaintiffs with restitution. CPC has requested a hearing on this matter pursuant to 29 C.F.R. § 5.11.

When Congress incorporated the Davis-Bacon standards into Section 5310, it was its understanding that Davis-Bacon wage standards were enforceable pursuant to the above administrative enforcement scheme and that, with the limited exception of the Miller Act remedy, no private right of action existed to enforce Davis-Bacon wage standards. See, Coutu, 450 U.S. at 778 (this Court noted that both proponents and opponents of unsuccessful proposed amendments to permit judicial review under the Davis-Bacon Act have both assumed that no judicial review was previously permitted); see, also HR 2216, 100th Cong. 1st Sess. (1987) (505-506) (Congressman Murphy, commenting on a proposed amendment to the Davis-Bacon Act which would have permitted judicial review and civil actions by employees, stated "[i]t provides two alternatives to the present much-criticized compliance system of exclusive relief from the Department of Labor") (600) (emphasis added); see also comments of Congressman Stenholm on HR 2216 (amendment would allow an "unprecedented private right of action") (602).

Although not all the proposed amendments were defeated on the merits, it is clear that Congress believed that Davis-Bacon and its Related Acts should be enforced administratively because of the expertise of the Department of Labor. See, e.g., Administration of the Davis-Bacon Act, General Subcommittee on Labor of the Committee on Education and Labor, 88th Cong. 1st Sess. (1963) (557) ("The Davis-Bacon and related acts involved over 46,000 project determinations a year with over a million individual wage determinations. With such a tremendous amount of determinations and with the need to proceed with

construction promptly, judicial review would not be appropriate to such a situation. The subcommittee found that the Davis-Bacon Act and its administration involves not merely an application of a set of legal provisions, but also very serious problems of industrial relations where actual experience in the local area many times influenced the way the law could be applied").

Under Suter, the adoption by Congress of the administrative enforcement scheme in Section 5310, supports a finding that Congress did not intend to create an enforceable right when it enacted Section 5310 but a "generalized duty" to be enforced by the Department of Labor.[7] See Suter, supra, 112 S.Ct. at 1368-1370 (although the statutory enforcement mechanisms there were not sufficiently comprehensive to demonstrate Congressional intent to preclude a § 1983 remedy, they did show that the absence of a § 1983 remedy did not make the provision in question "a dead letter" and that Congress

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[7] In addition to the administrative enforcement scheme specifically adopted in Section 5310, Section 5311 sets forth the enforcement powers of the Secretary of the Department of Housing and Urban Development ("HUD") for violations of Title I. Pursuant to the Department of Labor regulations, HUD, as the federal agency administering the funds, is required to monitor compliance with the wage standards provisions of Davis-Bacon Related Acts and to refer all violations and questions regarding Davis-Bacon standards and coverage to the Department of Labor. 29 C.F.R. §§ 5.6, 5.9, 5.12 (1974). Thus, even under HCDA, § 5311, Davis-Bacon questions should be referred to the Department of Labor before HUD takes enforcement action against the recipients of funds.

intended it to be enforced, not by private parties, but by the Secretary of Health and Human Services).[8]

Even under Wilder, respondents' Section 1983 claims must be dismissed because the administrative enforcement scheme is sufficiently comprehensive to demonstrate Congress' intent to preclude a Section 1983 remedy.

The determination whether a statutory enforcement scheme is sufficiently comprehensive does not turn on whether the scheme offers the benefitted parties complete relief or a judicial remedy. Rather, this Court in Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) and Smith v.

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[8] Justice Blackmun, in his dissenting opinion in Suter, which was joined by Justice Stevens, argued that:

> In our prior cases, the existence of other enforcement mechanisms has been relevant not to the question whether the statute at issue creates an enforceable right, but to whether the second exception to § 1983 enforcement applies – whether, that is, "'congress has foreclosed enforcement of the statute in the enactment itself.'" Wilder, 496 U.S., at 508, 110 S.Ct., at 2517 (quoting Wright v. Roanoke Redevelopment and Housing Authority, 479 U.S. 418, 423, 107 S.Ct. 766, 770, 93 L.Ed. 2d 781 (1987)). In determining whether this second exception to § 1983 enforcement applies, we have required the defendant not merely to point to the existence of alternative means of enforcement, but to demonstrate "by express provision or other specific evidence from the statute itself that Congress intended to foreclose (§ 1983) enforcement." 496 U.S. at 520-521, 110 S.Ct. at 2523.

Robinson, 468 U.S. 972 (1984), focused on the elaborate and detailed nature of the enforcement schemes there and in the inconsistency which would be created if a Section 1983 remedy were permitted. Smith, 468 U.S. at 1011; Sea Clammers, 453 U.S. at 14-15, 20.

In Coutu, this Court recognized the elaborate nature of the administrative enforcement scheme set forth in the Davis-Bacon Act and the regulations promulgated pursuant to Reorganization Plan No. 14. The issue in Coutu was whether the Davis-Bacon Act conferred a "private right of action for back wages under a contract that administratively has been determined not to call for Davis-Bacon work." 450 U.S. at 767-768. This Court held that the Davis-Bacon Act did not confer such a private right of action.

This Court reasoned that "the implication of a private right of action where there has been no Davis-Bacon determination would introduce substantial uncertainty into government contracting" and would undercut "the elaborate administrative scheme." Further, the "uniformity fostered by those regulations would be short-lived if courts were free to make post-contract rulings." Id. at 783. This Court also recognized that the Davis-Bacon Act carefully balances the interests of contractors and their employees. Id. at 782. The administrative scheme is set up not only to afford employees relief, but to afford such relief when funds can be withheld and thus, be available to compensate employees. Further, the scheme was set up so that contractors would not be subjected to unexpected post-contract expenses.

Although this Court in Coutu did not reach the "broader question whether the federal courts have any jurisdiction to review agency [Department of Labor] coverage and classification determinations or to decide whether an implied right existed in a contract which did include Davis-Bacon stipulations," this Court noted that some of its reasoning "arguably applies to the question of whether the Act creates any implied right of action." 450 U.S. at 789, n.19.

This Court's reasoning in Coutu supports a determination that Congress intended that Section 5310 and other Davis-Bacon Related Acts be enforced by the Department of Labor. First, permitting a Section 1983 remedy will clearly undercut the administrative enforcement scheme since laborers will be permitted to by-pass the Department of Labor. Further, before an employee can recover back pay, a court must determine (1) whether the work performed was Davis-Bacon work and (2) the classification of this work. Not only are these matters better addressed to the expertise of the Department of Labor, allowing courts to make these determinations may lead to inconsistent results because Courts may differ with each other and the Department of Labor on issues of coverage and classification. Finally, allowing post-contract suits subjects contractors, as well as localities, to unexpected construction expenses at a time when monies may not be available to compensate the employees.

In sum, the Second Circuit's decision is completely contrary to Congress' intent that HCDA, § 5310 and all

Davis-Bacon Related Acts be enforced by the Department of Labor.

(2)

The Second Circuit's reasoning gives laborers an unprecedented right of action under Section 1983 to enforce not only the Davis-Bacon wage provision of HCDA, Title I but also of several other Davis-Bacon Related Acts that contain identical or similar wage provisions.

Under the Second Circuit's reasoning, several other Davis-Bacon Related Acts would also confer upon laborers a right enforceable under Section 1983. For example, the prevailing wage provision of the Elementary and Secondary Education Act, 20 U.S.C. § 1232b provides (emphasis added):

> Except for emergency relief under Section 241-1 of this title, all laborers and mechanics employed by contractors or subcontractors on all construction and minor remodeling projects assisted under any applicable program shall be paid wages at rates not less than those prevailing on similar construction and minor remodeling in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act.

In addition to the Elementary and Secondary Education Act, which applies to all grant programs administered by

the Secretary of Education, the relevant language of the following Davis-Bacon Related Acts are also identical to HCDA, § 5310: (1) Headstart, Opportunity and Community Partnership Act of 1974, 42 U.S.C. § 2992a; (2) Energy Conservation and Production Act, 42 U.S.C. 6881(h); (3) Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450e(a); (4) Domestic Volunteer Service Act of 1973, 42 U.S.C. § 5046; and (5) Emergency Community Facilities Act of 1970, 42 U.S. § 3107.

Additionally, other acts contain language specifically requiring the recipient of federal funds to provide, as a condition of funding, adequate assurance that prevailing wages will be paid. See, e.g., National Foundation on the Arts and Humanities Act of 1965, 20 U.S.C. § 954(n); Older Americans Act of 1965, 42 U.S.C. § 3027(a)(14)(D); Solid Waste Disposal Act, 42 U.S.C. § 6979; Hospital Survey and Construction Act, 42 U.S.C. § 291e(a)(5).[9]

Under the Second Circuit's reasoning, these other Davis-Bacon Acts would also create an enforceable right.

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[9] The relevant sections of the Davis-Bacon Related Acts cited above have been reprinted in the Appendix, at pages A112-120. There are numerous other Davis-Bacon Related Acts which contain wage provisions identical or similar to HCDA, Section 5310, but which are not included herein because they have since been either repealed or appropriations for the programs to be funded under the acts have ended. See, e.g., Commercial Fisheries Records and Development Act of 1964, 16 U.S.C. §779(e); Energy Security Act, 42 U.S.C. §8775.

For example, the Second Circuit, in determining that laborers were the intended beneficiaries of HCDA, § 5310, reasoned (A17):

> [w]hile the ultimate goal of Congress in enacting the HCDA was, as a whole, the development of viable urban communities by providing decent housing and expanding economic opportunities for persons of low and moderate income, there can be no question that the provisions for payment of a certain minimum wage confers its principal benefit on the wage earners.

Since the prevailing wage provisions of the other Davis-Bacon Related Acts also focus on the wage earners, the same conclusion can be drawn with respect to these other Acts notwithstanding the fact that Congress' overriding goal in enacting these statutes was not in any way related to the payment of prevailing wages.

Further, if Section 5310 imposes a binding obligation on the recipients of federal funds to pay prevailing wages because of the words "shall be paid" in that provision, then the other Davis-Bacon Related Acts discussed above would also impose such an obligation.

Finally, the Second Circuit found that Congress did not intend the statutory enforcement scheme specifically adopted in Section 5310 to be the exclusive enforcement mechanism for that provision. The Court reasoned that the statutory enforcement scheme, which included an

administrative enforcement mechanism before the Department of Labor, was not sufficiently comprehensive.

The Second Circuit's reasoning applies with equal force to the other Davis-Bacon Related Acts discussed above since they all (1) incorporate the Department of Labor enforcement mechanism and (2) do not provide a judicial remedy for laborers.

In sum, if the Second Circuit's decision is permitted to stand, laborers working on projects funded, not only by Title I, but also by several other Davis-Bacon Related Acts would be able to bring civil suits seeking back wages. As set forth above, however, Congress intended that Section 5310 and all other Davis-Bacon Related Acts be enforced by the Department of Labor. Thus, this case raises important issues of significance, not only to the parties herein, but also to many others.

(3)

In determining that HCDA, § 5310 created an enforceable right, the Second Circuit failed to interpret that provision in the context of the rest of HCDA, Title I as required by Suter v. Artist M., ___ U.S. ___, 112 S.Ct. 1360, 1370 (1992). Further, the Second Circuit's decision conflicts in principle with Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 774 (1st Cir., 1986).

In determining whether a federal statute creates an enforceable right, the Court should conduct a "[c]areful examination of the language relied upon by respondents, in the context of the entire Act." Suter, supra, 112 S. Ct. at 1370 (emphasis added). The Second Circuit, however, interpreted HCDA, § 5310 in isolation and not in the context of the rest of Title I.

When HCDA, § 5310 is read in the context of Title I, it is clear that respondents-laborers are not the intended beneficiaries of Title I. Rather, the intended beneficiaries are the communities and localities to whom Title I funds were to be distributed. Congress, in its declaration of purpose in enacting Title I, 42 U.S.C. § 5301(c), stated:

> The preliminary objective of this chapter is the development of viable urban communities, by providing decent housing

> and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income. Consistent with this primary objective, the Federal assistance provided in this chapter is for the support of community development activities which are directed toward the following specific objectives ...

Congress then enumerated nine specific objectives: (1) the elimination of slums and deterioration of property; (2) the elimination of unsafe conditions, through code enforcement and rehabilitation; (3) the conservation and expansion of housing stock; (4) the expansion and improvement of the quantity and quality of community services; (5) a more rational utilization of land; (6) the promotion of diversity and vitality of neighborhoods; (7) the restoration and preservation of properties of "special values for historic, architectural, or aesthetic reasons;" (8) the "stimulation of private investment and Community revitalization;" and (9) the conservation of scarce energy sources. 42 U.S.C. § 5301(c).

As demonstrated above, nothing in Congress's declaration of purpose even remotely supports a finding that laborers are the intended beneficiaries of Title I.

Further, the Second Circuit's holding conflicts in principle with Latinos Unidos De Chelsea En Accion v. Secretary of Housing and Urban Development, 799 F.2d 774 (1st Cir., 1986). There, the plaintiffs, minority residents of a City, claimed that the City discriminated

against them in connection with programs funded under Title I. They argued that the anti-discrimination clause of Title I, Section 5309(a), created a private right of action. The First Circuit held that although Section 5309(a) focused on a class of individuals to be protected, that provision could not "be viewed in isolation and must be considered as part of the context in which it appears." 799 F.2d at 793. The First Circuit noted that Congress' primary purpose in enacting Title I was not to prevent discrimination but was to foster "'the development of viable urban communities'" (quoting 42 U.S.C. § 5301(c)). Id. The First Circuit thus concluded that the enactment of Section 5309(a) "reflects generally the requirement that federal fund recipients not discriminate, rather than an intent to benefit a special class." Id. at 794.

Petitioners recognize that the Davis-Bacon Act itself is a law "designed for the benefit" of workers. See, United States v. Binghamton Construction Co., 347 U.S. 171, 178 (1954). However, unlike the Davis-Bacon Act, which is purely a labor standards statute, Section 5310 is only one provision of Title I. The Second Circuit erroneously read Section 5310 in isolation when it determined that laborers were its intended beneficiaries.

Additionally, Congress' use of the words "shall be paid" in Section 5310 is not dispositive of the issue of whether Congress intended to impose a binding obligation on recipients to pay prevailing wages. Congress' purpose in enacting Title I was not to ensure the payment of prevailing wages but to streamline the means by which federal funds were distributed so that localities would have

greater flexibility in designing and implementing community programs. Section 5310 is not an integral part of Title I. Compare, Wilder (the provision in question there, which did impose a binding obligation on recipients of funds, was an integral part of the Medicaid program and its statutory and regulatory scheme).

(4)

Lower Courts need guidance as to the proper framework to apply in determining whether a federal statute creates a right enforceable under Section 1983.

Several circuits and district courts have questioned the viability of the Wilder analysis in light of Suter because (1) this Court in Suter did not apply the Wilder analysis and (2) Justice Blackmun, in his dissenting opinion joined by Justice Stevens, argued that the Suter majority had abandoned the Wilder framework. 112 S.Ct. at 1371. See, e.g., Resident Council of Allen Parkway Village v. United States Department of Housing and Urban Development, 980 F.2d 1043, 1051 (5th Cir., 1993), petition for cert. pending, 92-1905 (filed May 27, 1993); Stowell v. Ives, 976 F.2d 65, 68 (1st Cir., 1992); Clifton v. Schafer, 969 F.2d 278 (7th Cir., 1992); Evelyn v. Kings County Hospital Center, 819 F. Supp. 183, 190 (E.D.N.Y., 1993); Lampkin v. District of Columbia, _F. Supp. __, 60 U.S.L.W. 2807 (D.D.C., 1992); Board of Education v. Leininger, 822 F. Supp. 516, 529 (N.D. Ill., 1993).

Faced with this uncertainty as to the proper framework to apply, courts, such as the Second Circuit in this case, have applied the Wilder analysis with some modifications suggested by Suter. See, e.g., Stowell v. Ives, supra, 976 F.2d at 68; Clifton v. Schafer, 969 F.2d 278 (7th Cir., 1992); see also, Arkansas Medical Society, Inc. v. Reynolds, _ F.3d__, 1993 W.L. 341165 (8th Cir., 1993); Resident Council of Allen Parkway Villages, supra, 980 F.2d at 1052. However, Wilder and Suter are not completely reconcilable. For example, under Suter, the existence of a statutory enforcement scheme is relevant when determining whether Congress intended to create an enforceable right. Under Wilder, however, the statutory enforcement scheme is only relevant to Congress' intent to preclude a Section 1983 remedy. In this case, the Second Circuit reconciled the two approaches by simply not including the statutory enforcement scheme in its analysis as to whether HCDA, § 5310 created an enforceable right. Thus, this Court should give guidance to the lower courts as to the proper framework to apply in determining whether a federal statute creates an enforceable right.

(5)

The Second Circuit has expanded the state action doctrine and has imposed on all state governing entities an obligation to ensure that government contracts, on their face, are sufficiently funded to permit the contractor to pay Davis-Bacon wages, where applicable.

The Second Circuit found state action in this case based on the allegations that (1) the per worker per day funding cap placed in the contracts by the City did not provide CPC with sufficient funds to pay prevailing wages and (2) CPC was prohibited from receiving funds from other sources to fulfill its obligations under the contract. The Second Circuit thus found that the City "'has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [city].'" (quoting San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522, 547 (1987)) (A22-23).

In so doing, the Second Circuit failed to recognize that (1) the contracts specifically provided that CPC had to comply with all federal laws, including the payment of prevailing wages, where applicable (89, 129, 337, 382, 939, 939fff); (2) CPC was responsible for determining whether it could comply with the contracts before entering into the contracts; and (3) if the contracts proved not to be sufficiently financed, CPC, a non-profit organization, was still free to cover some of its costs out of its own pocket or operating budget.

The Second Circuit has placed an affirmative obligation on state governing entities to ensure that every bid proposal is sufficiently financed to cover all applicable federal laws which may confer enforceable rights under 42 U.S.C. § 1983. Such an extension of the state action doctrine is without precedent. See, Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (private entities do not become state actors simply because they contract with the government); Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[m]ere approval of or acquiescence" by state of private party action not state action even if activity is "extensively regulated" by state).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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